No. 75-1522

In the Supreme Court of the United States

OCTOBER TERM, 1975

SANDRA KANTROWITZ, PETITIONER

v.

F. DAVID MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-55 to A-57) is not yet reported. The opinion of the three-judge district court (Pet. App. A-36 to A-54) is reported at 388 F. Supp. 1127.

JURISDICTION

The judgment of the court of appeals was entered on January 28, 1976. The petition for a writ of certiorari was filed on April 22, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).[1]

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[1]Petitioner erroneously invokes this Court's jurisdiction under 28 U.S.C. 1253. See note 5, *infra*.

QUESTION PRESENTED

Whether Title XIX of the Social Security Act invidiously discriminates on the basis of age by denying the states reimbursement, under the federal Medicaid program, for expenditures for inpatient medical services received by individuals over 20, but under 65, years of age in institutions for mental diseases.

STATUTORY PROVISIONS INVOLVED

With the exceptions noted below, the relevant statutory provisions are set forth at Pet. App. A-58.

42 U.S.C. (Supp. IV) 1396d(a) provides, in pertinent part:

> The term "medical assistance" means payment of part or all of the cost of the following care and services * * *
>
> * * * * *
>
> (14) inpatient hospital services, skilled nursing facility services, and intermediate care facility services for individuals 65 years of age or over in an institution for tuberculosis or mental diseases;
>
> * * * * *
>
> (16) effective January 1, 1973, inpatient psychiatric hospital services for individuals under age 21, as defined in subsection (h) of this section; * * *.

42 U.S.C. (Supp. IV) 1396d(h) provides:

> (1) For purposes of paragraph (16) of subsection (a) of this section, the term "inpatient psychiatric hospital services for individuals under age 21" includes only—

> * * * * *
>
> (B) inpatient services which, in the case of any individual (i) involve active treatment which meets such standards as may be prescribed in regulations by the Secretary, and (ii) a team, consisting of physicians and other personnel qualified to make determinations with respect to mental health conditions and the treatment thereof, has determined are necessary on an inpatient basis and can reasonably be expected to improve the condition, by reason of which such services are necessary, to the extent that eventually such services will no longer be necessary; * * *.

STATEMENT

Prior to the amendment of the Social Security Act in 1965, the United States had not participated in the financing of medical care of individuals receiving long-term inpatient treatment in mental hospitals; such financing was, in principal part, the responsibility of the separate states. S. Rep. No. 89-404, 89th Cong., 1st Sess. 144-147 (1965). With the enactment of Title XIX of the Act, 42 U.S.C. 1396 *et seq.*, the federal government offered to reimburse the states for part of the cost of providing inpatient services in mental institutions for poor persons 65 years of age or older.[2]

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[2]Section 1396d also provided for partial reimbursement for the costs of mental health treatment of needy persons of all ages in institutions providing general hospital services, where the length of treatment generally is shorter than in mental institutions, or on an outpatient basis or in intermediate care facilities. 42 U.S.C. 1396d (a)(1), (2), (9), and (15). In the field of psychiatric services for the poor, the federal effort has been designed to encourage the transfer of care of the mentally ill from custodial institutions to community facilities. *E.g.*, the Community Mental Health Centers Act, 77 Stat. 290, 42 U.S.C. 2681 *et seq.*; H.R.

Petitioner, age 34 when this litigation began, received treatment over a period of years in various facilities for the mentally disabled in New York State. At the recommendation of her physician, she was admitted to a private, non-profit hospital licensed by the State of Pennsylvania to provide inpatient treatment of the mentally ill (Pet. App. A-38). Petitioner requested that New York pay the costs of her institutional care in the Pennsylvania facility under the Medicaid program, a cooperative state-federal program in which New York participates (*ibid.*). After an administrative hearing, her request was denied on the ground that the Medicaid Act prohibits federal reimbursement of state expenditures for medical assistance provided in a mental institution to a patient under 65 years of age, and the conforming state statute barred assistance unless federal matching funds were available (Pet. App. A-34 to A-35, A-38).[3]

Rep. No. 694, 88th Cong., 1st Sess. (1963). Indeed, the Medicaid Act requires a state which received matching funds made on behalf of persons 65 years or older who are patients in mental institutions to plan and develop "alternate methods of care" and demonstrate that it "is making satisfactory progress toward developing and implementing a comprehensive mental health program, including provision for utilization of community mental health centers, nursing facilities, and other alternatives to care in public institutions for mental diseases." 42 U.S.C. 1396a(20) and (21).

[3]After the administrative decision, the Social Security Act was amended to authorize payment of federal matching funds to reimburse the states for the costs of inpatient psychiatric hospital services rendered an individual under the age of 21 when it is determined that such treatment "can reasonably be expected to improve the condition, by reason of which such services are necessary, to the extent that eventually such services will no longer be necessary * * *." 42 U.S.C. (Supp. IV) 1396d(a)(16) and (h)(1)(B).

Contrary to petitioner's statement (Pet. 12-13), the states can obtain partial reimbursement under the Medicaid Act for state expenditures for psychiatric services on behalf of (1) inpatients in mental institutions who are either 65 years of age or over or who

Petitioner thereupon instituted this class action in the United States District Court for the District of Columbia, seeking declaratory and injunctive relief and retroactive benefits. The complaint alleged that in limiting federal reimbursement of state medical assistance provided in facilities for mental diseases to that assistance rendered to individuals over 64, or under 21, years of age, the Act arbitrarily discriminates against individuals between those ages (Pet. App. A-37 to A-38).

A three-judge district court heard the case on cross-motions for summary judgment (Pet. App. A-39 to A-40). It refused to certify the suit as a class action[4] and upheld

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are under 21 years of age and whose mental health is capable of restoration to the point that they may rejoin society, and (2) otherwise eligible persons of any age who receive inpatient psychiatric services other than in an institution for mental diseases (Pet. App. A-41 to A-42). See 42 U.S.C. (Supp. IV) 1396d(a)(1) and (15); S. Rep. No. 92-1230, 92d Cong., 2d Sess. 280-281 (1972).

[4]Petitioner sought to represent the class of "all persons eligible for medical assistance who are between 21 and 65 years of age and are patients in institutions for mental disease and all persons eligible for medical assistance who are less than 65 years of age and are patients in institutions for tuberculosis, and whose care in either the mental disease or tuberculosis institutions is not paid for under the Medicaid program" (Pet. App. A-8).

The district court held that since petitioner does not suffer from tuberculosis, she lacked standing to sue on behalf of patients in tubercular institutions (Pet. App. A-37 n. 1). See Rule 23(a)(4), Fed. R. Civ. P. Moreover, it found that there had been no showing that any such patients had pursued administrative remedies or satisfied the jurisdictional amount (Pet. App. A-37 n. 1). Cf. *Weinberger* v. *Salfi*, 422 U.S. 749, 763-764.

The court declined to certify the suit as a class action on behalf of patients in mental institutions on the ground that their claims were separate and distinct and could not be aggregated for purposes of the jurisdictional amount prescribed by 28 U.S.C. 1331 (Pet. App. A-39). See *Zahn* v. *International Paper Co.*, 414 U.S. 291. However, the court found that petitioner's individual claim met the jurisdictional requirements of that statute (Pet. App. A-39).

the constitutionality of the statute. The court of appeals affirmed on the basis of the district court's opinion (Pet. App. A-55 to A-57).[5]

ARGUMENT

In the absence of infringement of a fundamental constitutional right or a distinction based upon a suspect classification,[6] the standard for determining the constitutionality of a statutory classification under the Social Security Act is whether it "manifests a patently arbitrary classification, utterly lacking in rational justification." *Weinberger* v. *Salfi*, 422 U.S. 749, 768, quoting from *Flemming* v. *Nestor*, 363 U.S. 603, 611. As this Court observed in *Richardson* v. *Belcher*, 404 U.S. 78, 81, "[a] statutory classification in the area of social welfare is consistent with the Equal Protection Clause of the Fourteenth Amendment if it is 'rationally based and free from invidious discrim-

[5]Since the three-judge district court denied relief on the merits of petitioner's constitutional claim, appeal from its denial of injunctive relief would have lain directly to this Court. *MTM, Inc.* v. *Baxley*, 420 U.S. 799, 804. Petitioner filed a notice of appeal to this Court with the district court but never perfected that appeal. Because the court of appeals lacked jurisdiction to review the denial of injunctive relief (28 U.S.C. 1291), the propriety of that denial is not properly presented to this Court.

However, the court of appeals did have jurisdiction to review the district court's denial of declaratory relief and retroactive benefits (see *Gerstein* v. *Coe*, 417 U.S. 279), and, accordingly, those issues are properly before this Court.

[6]Apparently acknowledging the correctness of the court of appeals' decision if the constitutionality of the challenged classification is to be measured under the rational basis standard (Pet. 20-21), petitioner contends that the statute can be upheld only if justified by a compelling interest. Contrary to petitioner's assertion (Pet. 19-24), however, the statutory provision here at issue does not infringe upon any fundamental right.

ination' "; such a classification "is perforce consistent with the due process requirement of the Fifth Amendment." The classification challenged by petitioner rests upon a rational basis and is free from invidious discrimination.

1. In establishing the Medicaid program under Title XIX of the Social Security Act, 42 U.S.C. 1396d, Congress provided for partial federal reimbursement of state expenditures for certain specified categories of health services that it determined to be most critical. The stated purpose of Title XIX is to permit the states to furnish, to the extent within their means, "(1) medical assistance on behalf of families with

Unlike *Memorial Hospital* v. *Maricopa County*, 415 U.S. 250, payment of the costs of treatment for mental illness was not denied petitioner, while being granted to others, solely because she traveled from New York to Pennsylvania. She was denied assistance because of her age and the nature of the institution in which she accepted treatment, not because the treatment was rendered in an out-of-state facility. She would equally have been denied reimbursement if the treatment had been provided in a New York facility.

The restriction on Medicaid benefits does not infringe upon her fundamental right to choose the most appropriate program of medical treatment in consultation with her physician (Pet. 19-24). The statute simply establishes the terms and conditions under which the federal government will reimburse the states for assistance rendered persons treated in mental institutions. It does not interfere with the patient's right to consult the doctor of choice, nor require that the physician prescribe or refrain from prescribing any form of treatment. Accordingly, Congress has not unconstitutionally interfered with the patient's right of privacy. See *Association of American Physicians and Surgeons* v. *Weinberger*, 395 F. Supp. 125 (N.D. Ill.), affirmed, November 17, 1975, No. 75-361.

Petitioner does not contend that the challenged legislation discriminates against persons on the basis of race or nationality. Age is not a suspect classification. See *Jefferson* v. *Hackney*, 406 U.S. 535, 549.

dependent children and of aged * * * individuals, whose income and resources are insufficient to meet the costs of necessary medical services, and (2) rehabilitation * * * services to help such families and individuals attain or retain capability for independence or self-care * * * ." 42 U.S.C. (Supp. IV) 1396. Of necessity, the types of medical services for which federal matching funds can be provided to the states are limited by the fiscal constraints on the federal government's financial resources. Hearings on Medical Care for the Aged Amendments before the Senate Finance Committee, 88th Cong., 2d Sess. 33 (1964).

Congress was aware that the states had traditionally accepted responsibility for the care of the mentally ill, and it reasonably determined not to use federal funds merely to displace that health care delivery system. See H.R. Rep. No. 89-213, 89th Cong., 1st Sess. 126, 128 (1965). The principal purpose of the Medicaid Act was to expand public health assistance, not to replace state with federal aid. However, Congress rationally concluded that persons 65 years or older would tend to have a greater need for government-subsidized inpatient psychiatric services, because they are least able of all groups in society to bear these expenses themselves, and that, by reimbursing the states for such expenditures, the federal government would encourage the upgrading of treatment provided the elderly. See S. Rep. No. 89-404, 89th Cong., 1st Sess. 144-147 (1965).

In *Jefferson* v. *Hackney*, 406 U.S. 535, this Court upheld the constitutionality of a similar age classification that preferred the elderly poor over other potential public assistance recipients, based upon a legislative judgment of their particular need. By the same reasoning, as the courts below held, it was permissible

for Congress, consistent with the purposes of the Medicaid statute, to give preferential treatment to the mental care requirements of the elderly (Pet. App. A-48 to A-50).

Furthermore, as the courts below properly ruled (Pet. App. A-50 to A-52), the subsequent amendment of Title XIX to provide such matching funds for state expenditures for remedial inpatient psychiatric care for certain individuals under 21 years of age (42 U.S.C. (Supp. IV) 1396d(a)(16) and (h)) constituted a rational step toward broadening the class of persons covered by Medicaid. As the Senate Finance Committee noted (S. Rep. No. 92-1230, 92d Cong., 2d Sess. 281 (1972)):

> * * * the nation cannot make a more compassionate or better investment in medicaid than this effort to restore mentally ill children to a point where they may very well be capable of rejoining and contributing to society as active and constructive citizens.

Aid to children historically has been a principal concern of Congress in allocating Social Security benefits. In light of the enormous expense potentially involved in supplementing the traditional provision by the states[7] of psychiatric services for the mentally ill, the concentration of limited federal resources where the need and the potential response to treatment were believed

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[7]Congress estimated that in the first two calendar years of operation, the extension of these benefits to children under 21 years of age would cost approximately $224 million (Pet. App. A-46 to A-47). 118 Cong. Rec. 37354 (1972).

greatest constitutes a rational allocation of benefits in keeping with Medicaid's stated objectives.[8]

2. As the courts below recognized (Pet. App. A-40 to A-41), the constitutionality of the classification between inpatient psychiatric care rendered in mental institutions, and similar care rendered in other types of treatment centers, was established in *Legion* v. *Richardson,* 354 F. Supp. 456 (S.D. N.Y.), affirmed *sub nom. Legion* v. *Weinberger,* 414 U.S. 1058. Contrary to petitioner's argument (Pet. 32-34), the Court's summary affirmance in *Legion* was a decision on the merits and is a binding precedent. *Hicks* v. *Miranda,* 422 U.S. 332, 344-345.

3. Although Medicaid benefits may not be as comprehensive as petitioner wishes, "the Equal Protection Clause does not require that [the government] choose between attacking every aspect of a problem or not attacking the problem at all." *Dandridge* v. *Williams,* 397 U.S. 471, 486-487. The government may proceed one step at a time, dealing with the phase of the problem that appears most urgent and leaving other aspects unresolved. *Jefferson* v. *Hackney, supra; Williamson* v. *Lee Optical Co.,* 348 U.S. 483. As this Court reaffirmed in *Geduldig* v. *Aiello,* 417 U.S. 484, 495,

[8]In *Montoroula* v. *Parry,* 83 Misc. 2d 1034, 373 N.Y.S. 2d 980 (Sup. Ct.), a New York trial court held that the denial of state financial assistance to a 24-year old receiving inpatient treatment in a private mental institution under a state statute conforming to Section 1396d(a) denied him equal protection of the law, on the ground that it created an invidious discrimination among physically and mentally ill adults. Unlike the instant case, however, the state there did not contend that the age classification bore any rational relation to the objective of the statute. *Id.* at 983. In any event, this decision by a New York court of first impression, concerning the denial of benefits by a state, provides no basis for review of the decision below.

"[p]articularly with respect to social welfare programs, so long as the line drawn by the [government] is rationally supportable, the courts will not interpose their judgment as to the appropriate stopping point."

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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